

LEGAL HOT TOPICS MAY 2021

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Employers & Lawyers. Working Together

GIVE YOURSELVES A ROUND OF APPLAUSE!!

- This has been a HARD year for employers and Human Resources!



TODAY'S UPDATE

- Challenges presented by COVID-19
 - Vaccinations
 - Remote Employees
 - Virginia's "Final Permanent Standard" for Infectious Disease Prevention
- New Employment Laws in Virginia
 - Misclassification of Independent Contractors
 - New Overtime Law
 - New Anti-Discrimination Laws
 - New Non-Compete Law



CAN WE REQUIRE OUR EMPLOYEES TO GET A VACCINATION?



VACCINATIONS

- The short answer: Yes, **BUT**...



- Employers must allow for :

- **Medical Accommodations Under the ADA**

- Employee must establish a covered disability.

- **Religious Accommodations Under Title VII**

- Must be a “sincerely held religious belief.”
 - Personal or ethical objections are not sufficient.

REMOTE WORKING



REMOTE WORKING

- Overtime Issues:
 - Under the FLSA employers must:
 - Pay non-exempt employees for all hours worked.
 - Prevent work that we do not want performed.
 - Enforce rules that prohibit work.
 - Pay for hours worked based on “actual or constructive knowledge” of employee work hours.



REMOTE WORKING

- DOL Issued Guidance in August:
 - Key Takeaways:
 - Must prevent unwanted work...but employer's duty to monitor is not unlimited.
 - Exercise "reasonable diligence" to ensure employees are paid for all time worked.
 - Establish a system that requires employees to accurately report all time.
 - Cannot "implicitly or overtly discourage or impede accurate reporting."
 - If employee fails to report, "employer is generally not required to investigate further to uncover unreported hours."



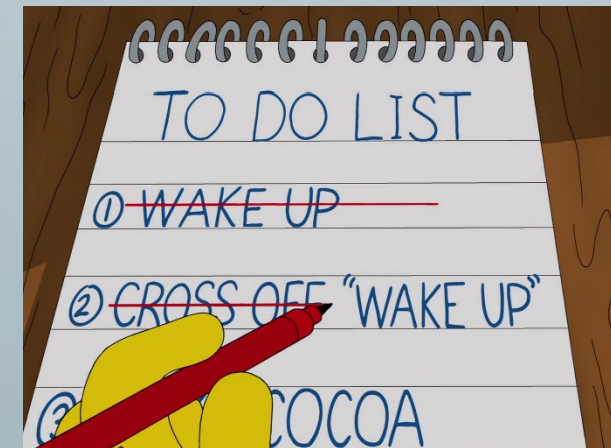
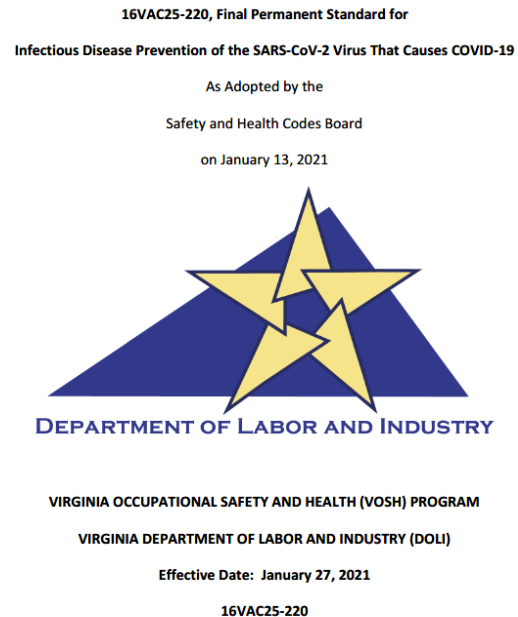
BRINGING THEM BACK??

Good luck trying to deny the next “reasonable accommodation” request to work from home!!



FINAL PERMANENT STANDARD

- July 24, 2020 – Emergency Temporary Standard
- Jan. 27, 2021 – Final “Permanent” Standard



FINAL PERMANENT STANDARD

- Mandatory Requirements for ALL Employers:

- Hazard assessments
- Encourage self-monitoring
- Cannot use antibody testing for employment purposes
- Reporting procedures
- Employees known/suspected of having COVID must go home
- Discussions with subcontractors / temp agencies
- Notification requirements for positive COVID case



FINAL PERMANENT STANDARD

- Return to Work Requirements for all Employers:
 - If employee is “KNOWN” or “SUSPECTED” of COVID-19:
 - Symptomatic Employees:
 - Fever-free for 24 hrs. / improved symptoms / 10 days
 - Symptomatic Employees (who test negative):
 - If employee had close contact:
 - 14 days after last date of close contact
 - If employee did NOT have close contact:
 - Fever-free for 24 hrs. and no symptoms
 - Asymptomatic Employees Known to be Infected:
 - 10 days from first positive test



FINAL PERMANENT STANDARD

- If you are a “Medium” Risk Employer:
 - Prescreening of employees
 - Physical distancing and barriers recommended (if feasible)
 - Face covering required if employees cannot socially distance
 - Create an Infectious Disease Plan
 - Mandatory training



INDEPENDENT CONTRACTORS

New Law Protecting Independent Contractors:

- Private cause of action if employer had “knowledge” of misclassification.
- Presumption that worker is an employee, unless employer proves independent contractor status.
- Mandates the use of IRS Guidelines for evaluating independent contractor status.



INDEPENDENT CONTRACTORS

IRS Guidelines:

- **BEHAVIORAL CONTROL** – A worker is an employee when the business has the right to direct and control the work performed by the worker, even if that right is not exercised.
- **FINANCIAL CONTROL** – Does the business have a right to direct or control the financial and business aspects of the worker's job?
- **RELATIONSHIP** – The type of relationship depends upon how the worker and business perceive their interaction with one another – e.g., written contracts / benefits/ permanency

INDEPENDENT CONTRACTORS

- Damages:
- Wages, salary, employment benefits, expenses incurred by the employee that would otherwise have been covered by insurance, other compensation lost, attorneys' fees.
- Opens the door for potential class actions.



NEW OVERTIME LAW

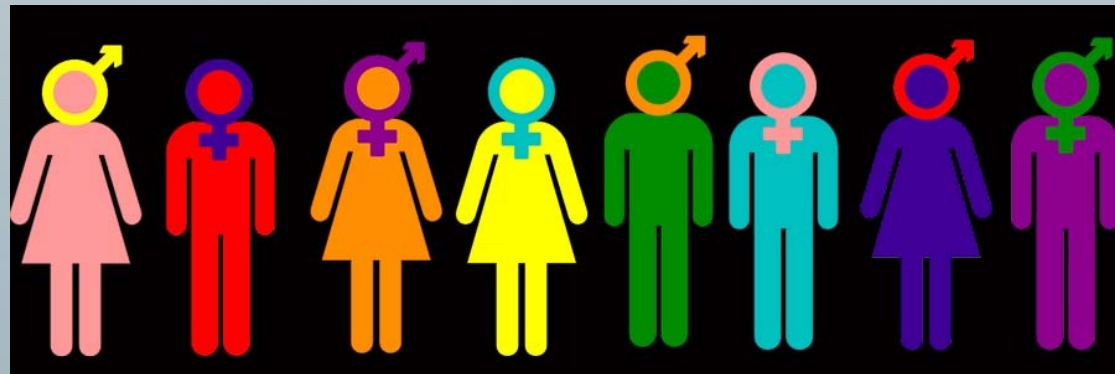
What It Does:

- First Virginia overtime law. Prior to this, the FLSA was the only method to pursue unpaid overtime wages.
- Allows for reasonable attorneys' fees, costs, and triple damages for knowing violations.
- If you have employees who work on a “fluctuating workweek” schedule, you will owe more for overtime.
- And remember...our minimum wage just went up to \$9.50. It will increase again to \$11 on 1/1/22, \$12 on 1/1/23, and \$13.50 on 1/1/25.

NEW ANTI-DISCRIMINATION LAW

Updates to the Virginia Human Rights Act:

- LGBTQ protections
- The law now protects employees from discrimination on the basis of:
 - Sexual Orientation
 - Gender Identity



NEW ANTI-DISCRIMINATION LAW

Updates to the Virginia Human Rights Act:

- Reasonable accommodation for pregnant employees
 - Longer bathroom breaks / modification of equipment / temporary transfer to less strenuous position / assistance with manual labor / job restructuring / modified work schedule / light duty assignments / leave to recover from childbirth.
- Handbook requirement.



NEW ANTI-DISCRIMINATION LAW

Updates to the Virginia Human Rights Act:

- Cannot discriminate based on “traits historically associated with race, including hair texture, hair type, and protective hair styles such as braids, locks, and twists.”



NON-COMPETE LAW

Ban on non-competes against “low-wage employees”

- Cannot have a non-compete agreement with a “low-wage employee,” which includes:
 - Employees earning less than \$1,200/wk. (\$62,400/year)
 - Interns, students, apprentices and trainees.
 - Independent Contractors earning less than \$21.74/hr.



NON-COMPETE LAW

Ban on non-competes against “low-wage employees”

- Penalties??
 - Individual supervisor liability
 - \$10,000 penalty for each violation
 - Private cause of action
 - Damages, fees and costs
- New posting requirements



ABOUT THE FIRM

Ogletree Deakins is one of the largest labor and employment firms representing management in all types of employment-related legal matters.

The firm has more than 900 attorneys located in 54 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.



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